

Pages 1 - 61

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

KALMAN ISAACS,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 18-CV-04865 EMC
)	
ELON MUSK, et al.,)	
)	
Defendants.)	
_____)	

San Francisco, California
Thursday, November 15, 2018

TRANSCRIPT OF PROCEEDINGS

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Thursday - November 15, 2018

1:58 p.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil Action 18-4865, Isaacs versus Musk, et al., related to Civil Action 18-4876, 18-4912, 18-4939, 18-4948, 18-5258, 18-5463, 18-5470, and 18-5899.

Counsel, please approach the podium and state your appearances for the record.

MS. CABRASER: Good afternoon, Your Honor. Elizabeth Cabraser, Lief Cabraser Heimann & Bernstein, together with my partner Katherine Lubin Benson, for movant, lead plaintiff applicant Mr. Dany David.

THE COURT: All right. Thank you, Ms. Cabraser.

MS. MYERS: Good afternoon, Your Honor. Danielle Myers, and with me is my partner Rachel Jensen, from Robbins Geller Rudman & Dowd, along with the Lief Cabraser firm, for lead plaintiff movant Dany David.

THE COURT: All right. Thank you.

MR. CHOI: Good afternoon, Your Honor. Mario Choi, Kaplan Fox & Kilsheimer. With me are partners Fred Fox and Larry King for the movants Tempus International and Opportunity Unique Fund.

THE COURT: All right.

MR. FOX: Good afternoon, Your Honor.

THE COURT: Thank you.

PROCEEDINGS

1 **MR. ABADOU:** Good afternoon, Your Honor. Ramzi Abadou
2 from the Kahn Swick & Foti law firm, here in San Francisco, on
3 behalf of Bridgestone Investment Corporation Limited.

4 I'd also like to take a moment to introduce my client,
5 Jian Liu, who flew down from Toronto for the hearing today.

6 Thank you, Your Honor.

7 **THE COURT:** All right. Thank you.

8 **MR. PORRITT:** Good afternoon, Your Honor. Nicholas
9 Porritt of the Levi & Korsinsky firm, representing movant
10 Glen Littleton.

11 **THE COURT:** All right. Thank you.

12 **MR. CHRISTOPHER KELLER:** Good afternoon, Your Honor.
13 Chris Keller, Labaton Sucharow, representing the Tesla Investor
14 Group; and with me, by no relation, is Ashley Keller, who's
15 also representing the Tesla Investor Group.

16 **THE COURT:** Thank you.

17 **MR. SELTZER:** Good morning, Your Honor. Marc Seltzer
18 of Susman Godfrey representing applicant FNY Investment
19 Advisers LLC, and with me is my co-counsel, Robert Cappucci.

20 **THE COURT:** All right. Good afternoon.

21 **MR. KATHREIN:** Good afternoon, Your Honor. Reed
22 Kathrein, with Hagens Berman Sobol Shapiro, representing movant
23 James Johnson.

24 **THE COURT:** All right. Thank you.

25 **MR. KRISTY:** Good afternoon, Your Honor. Dean Kristy,

1 Fenwick & West, with my colleague Jennifer Bretan. We
2 represent Tesla and Elon Musk.

3 **THE COURT:** All right. Great. Thank you.
4 You're outnumbered slightly here.

5 **MR. KRISTY:** Yeah, I'm a little lonely.

6 **THE COURT:** Yeah.

7 Well, what I'd like to concentrate on -- I know there are
8 lots of sort of very particular issues affecting various of the
9 proposed lead plaintiffs, some of those of a sort of
10 qualitative nature.

11 But what I'd like to do is take some time to talk about
12 some of the more larger issues to help me understand what the
13 potential, for instance, conflicts are and who should be
14 included and not included in the class, because there are so
15 many different kinds of investors and investments, long and
16 short options, stock purchases, and that may have some effect
17 on how we measure -- or how I measure who has the greatest
18 financial interest.

19 So, for instance, do I look at the aggregate in the end,
20 the net to each proposed lead plaintiff; or do I have to sort
21 of subcategorize those and look for those who had the largest
22 interests within a particular class of purchasers or sellers?

23 And so it is a little bit different here because it's
24 almost like taking a sneak peek at class cert issues in
25 advance, which I think is somewhat appropriate.

PROCEEDINGS

1 On the other hand, I do that cautiously because I don't
2 know enough at this point -- I don't know if anybody does -- to
3 make any definitive determinations about whether there are
4 going to be subclasses and that sort of thing.

5 But it'd be helpful to hear from you on some major points,
6 and I have some specific questions that have arisen.

7 So let me first ask -- and I'm going to ask by -- for no
8 other reason -- I could do this alphabetically. I'll just do
9 so based on the size of the asserted total loss. I know that's
10 in dispute. But just to have some order, rather than your
11 coming up at random, I'll give each of the representatives a
12 chance to say something. I'd like, though, to limit your
13 remarks to a couple of minutes so that we can get through; and
14 if I have further questions, I can come back to you.

15 And if there's nothing you have to add, don't worry. It's
16 not going to be held against you that you chose not to say
17 anything. In fact, that may be a plus.

18 So one question is: Who belongs in the class? I mean,
19 there are some obvious people, but maybe you can help me make a
20 little chart here. And some of the papers have done that, but
21 in terms of the different kinds of investors and investments.

22 And let me start with the representative of Tempus
23 International that has the biggest asserted loss, and then
24 Tesla Investment Group, and then Bridgestone, and then
25 Mr. Littleton, Mr. David, Mr. James, and then the

1 FNY Investment.

2 So give me a list of who should be included in the class,
3 what kinds of investments.

4 **MR. CHOI:** Mario Choi, Kaplan Fox.

5 To be perfectly honest with you, I think that obviously
6 the long purchasers and the short sellers should be in part of
7 the class -- or the putative class.

8 At this point, I actually don't think that there is really
9 a need to specify, honestly, because I think everybody here is
10 not going to disagree that they all had losses based on Tesla
11 and Mr. Musk's misrepresentations. It just calls into question
12 who has the largest financial loss in this case.

13 But keeping it short and sweet, the long purchasers, as
14 well as the short sellers.

15 I can see option holders also as part of the class, having
16 reviewed the papers myself. They, too, have asserted losses.
17 Obviously, at the class certification stage, and based on
18 discovery and expert opinion, that may change; but at this
19 point, I think they are a part of this putative class as well.

20 **THE COURT:** All right. Thank you.

21 Maybe at this point I should ask the defense side, because
22 I think you may have a slightly different view, or maybe I
23 misunderstood your view. Who should be excluded at this point?

24 **MR. KRISTY:** I think everybody should be excluded,
25 Your Honor.

1 **THE COURT:** All right. Thank you.

2 That's called a short and sweet answer.

3 **MR. KRISTY:** Your Honor, I think the -- it's been very
4 interesting to read the plaintiffs' submissions because they
5 highlight a lot of the issues that are going to come up in
6 various ways, either on the motion to dismiss, presenting
7 issues of reliance, transaction causation, loss causation,
8 damages, and certainly will come up on class certification.

9 What's very clear to me is one thing that the class cannot
10 be. And it's alleged in some of the complaints, including in
11 some of the lead plaintiff motions, which is they say all
12 transactions or all purchasers and all sales, without
13 differentiation of what they're talking about. So, for
14 example, the core argument of some of these people is "I want
15 it to be all transactions."

16 Well, it can't be because, accepting for a moment, for
17 purposes of argument today, that the stock price was inflated.
18 When the stock price was inflated, somebody who purchased it
19 may have suffered a loss. Think of your typical common stock
20 purchaser. But the person who sold it, who, under the
21 definition of about half of the people in this room, would be
22 included, that person profited. That person doesn't belong in
23 the class.

24 So it's not kind of our burden just yet, at this point in
25 the case, to say who --

1 **THE COURT:** When you say "sold," are you talking about
2 sale of common stock? Or --

3 **MR. KRISTY:** Sure. Sale of common stock, in that
4 situation, the guy who's on the other side of the transaction
5 of that purchase.

6 **THE COURT:** Sold during the inflated period?

7 **MR. KRISTY:** Correct.

8 And right now, the definitions in the existing complaint,
9 and even to some degree on these motions, don't explain how
10 both a purchaser and seller can be in the same class. They
11 can't be. One might have a claim. The other one doesn't.

12 Now, the arguments you might make are, well, we're talking
13 about a certain type of seller. It's going to be a short
14 seller who, in some ways, is really a purchaser, or some
15 options trader or what have you. Not my burden just yet to
16 tell them how they should define their class, but it can't be
17 the way they've been defining it so far.

18 That said, I think the most serious issues that you will
19 see on the motion to dismiss and the class issues really
20 surround what I'll call the short sellers, the derivative
21 securities, the options kinds of traders. Those will be
22 probably at the most forefront and present some of the more
23 complex issues.

24 But they're going to be the master of their pleading, and
25 we'll see how they allege it. But it can't be everybody. That

1 just doesn't work.

2 **THE COURT:** Right. But you acknowledge that there may
3 be some who sold, quote/unquote; but depending upon their
4 situation, it's conceivable that obviously a short seller may
5 have suffered a loss and maybe derivatives, to some extent.

6 **MR. KRISTY:** Sure.

7 Now, keep in mind, Your Honor, that the short seller,
8 while they're called a short seller, are actually --

9 **THE COURT:** Are actually buying, right.

10 **MR. KRISTY:** They are actually buying, right. They're
11 a type of purchaser. They're not really a seller.

12 **THE COURT:** Right.

13 **MR. KRISTY:** So somebody's going to have to explain
14 how these other sellers get into the case. I would have
15 thought it would be just all purchasers of different types.

16 **THE COURT:** Okay.

17 **MR. KRISTY:** That's our perspective.

18 The only other comment we had on this whole thing was just
19 one of efficiency, but I won't address that now. That was in
20 our submission.

21 From our perspective, who the lead plaintiff is and who
22 the lead plaintiff counsel is, that's not really our place to
23 say.

24 **THE COURT:** You want one to deal with as opposed to --

25 **MR. KRISTY:** Well, or the minimum number.

PROCEEDINGS

1 And what I don't want to have, Your Honor, is if it's
2 going to be a foreign applicant -- we have some applicants here
3 who are in Hungary, who are in other parts of Europe or in the
4 Middle East, have investment advisers in Brazil. If they're
5 appointed -- that's up to this side of the aisle, if you
6 will -- I want to make sure that they're going to participate
7 in discovery, assuming this case gets past the motion to
8 dismiss, here.

9 I don't want to hear about the Hague Evidence Convention.
10 I don't want to hear: Defendants, you have to go to Brazil to
11 take a deposition.

12 They want to sue here; they want to lead here; they should
13 be here. And I think that's our primary concern.

14 **THE COURT:** All right. Thank you.

15 **MR. KRISTY:** Thank you, Your Honor.

16 **THE COURT:** All right. You want to respond?

17 **MR. CHOI:** I do want to respond, Your Honor.

18 Some of what defense counsel has said, it is true that it
19 is the master -- the lead plaintiff is the master of the
20 complaint. And so, obviously, whomever is selected as lead
21 plaintiff will take into consideration all of the issues that
22 come into play before making that judgment call as to who
23 should be and who should not be in the -- in the -- in the
24 class.

25 **THE COURT:** Did you have an answer to -- a theoretical

PROCEEDINGS

1 answer or hypothetical answer to: What's an example of a
2 seller that --

3 **MR. CHOI:** Well, Tempus is one of those who short-sold
4 before but then purchased because of the --

5 **THE COURT:** Right. So the argument is, even though
6 you're called a short seller, you're actually purchasing during
7 the class period.

8 **MR. CHOI:** Exactly.

9 **THE COURT:** Can you conceive of anybody who sold
10 during the class period, not a short seller in that sense that
11 suffered damage, causally suffered damage as a result of the
12 alleged misrepresentation?

13 **MR. CHOI:** I can. I can see that there will be --
14 there may be -- you know, obviously, that will be subject to
15 review and to discovery. There may be certain individuals or
16 groups or people who sold -- who short-sold and then made a
17 gain or made a profit during the class period.

18 But this isn't the case here. None of the --

19 **THE COURT:** What I was asking is: Can you conceive of
20 somebody who sold during the class period who, nonetheless,
21 would have a claim here because they lost somehow, suffered a
22 loss?

23 **MR. CHOI:** Yes.

24 **THE COURT:** What's an example of that, even -- how
25 could somebody lose if they sold when the stock was

1 artificially inflated during this short window?

2 **MR. CHOI:** I am sure that one of my colleagues would
3 want the podium.

4 **THE COURT:** All right. Let me go in order here.

5 **MR. PORRITT:** I can give you a very concrete example.
6 Nicholas Porritt, Levi & Korsinsky.

7 **THE COURT:** All right. Let me -- I said I would go
8 down the list. You'll have your chance.

9 So from the Tesla Group.

10 **MR. ASHLEY KELLER:** Thank you, Your Honor. Ashley
11 Keller for the Tesla Investor Group.

12 Let me concretely answer your question. The class should
13 include purchasers of common stock during the relevant class
14 window. It doesn't matter whether they were purchasing to go
15 long or buying to cover. They should be included.

16 When we filed the initial complaint, we included sellers
17 of securities as well. And that may seem confusing because if
18 you sold stock at an artificially inflated price, to
19 Your Honor's previous set of questions, it seems like you've
20 benefited from the fraud so that shouldn't be included. But
21 what we had in mind, and what I suspect my able colleague was
22 about to say, are sellers of puts.

23 If you sold put options, you are a seller of a security,
24 the put option; but you are effectively taking a bet that the
25 underlying stock is going to rise in price. And if it happened

1 during the class window, you were harmed as well, just as a
2 purchaser of stock.

3 **THE COURT:** Well, if you're a put, if you own a put,
4 aren't you betting that the price will go down?

5 **MR. ASHLEY KELLER:** Yes. If you own a put, you are.
6 But if you sell a put, if you're short a put, writing a put, to
7 use the language of the industry, you're taking the opposite
8 bet. So that's why sellers should be included.

9 I cannot contemplate, contrary to my colleague who just
10 spoke, a situation where someone was selling stock during the
11 inflated period and that that would count.

12 **THE COURT:** Because that's the kind of seller who
13 would be included in the class?

14 **MR. ASHLEY KELLER:** The seller of a put should be
15 included in the class. I do not believe that the seller -- a
16 net seller of stock should be included in the class.

17 **THE COURT:** Right.

18 **MR. ASHLEY KELLER:** But there's another key point to
19 make here. You've heard me say it in describing each of those
20 types of securities. I would also add that buyers of call
21 options during the relevant class window should be included in
22 the class. They were harmed as well. Buying a call option is
23 also the equivalent of taking a bet.

24 **THE COURT:** Because they paid an inflated price?

25 **MR. ASHLEY KELLER:** That is exactly right. They paid

1 an inflated price as a result of the underlying reference
2 security, here being Tesla stock, being inflated in value.

3 **THE COURT:** All right. So it's not the sellers of
4 stock per se. It has to be sellers of something very
5 particular; in this case, sellers of a put option.

6 **MR. ASHLEY KELLER:** That's correct.

7 **THE COURT:** And then buyers of a call option.

8 **MR. ASHLEY KELLER:** But a key point -- and I don't
9 mean to go into argument yet if you wanted to focus on this
10 narrower issue. But you had to have been a purchaser of stock
11 or calls or a seller of puts during the relevant period while
12 the securities were tainted by fraud. If you purchased a call
13 on August 2nd or in December of 2017, that can't count.
14 Mr. Musk hadn't even contemplated his tweet, I imagine, at
15 those periods of time. And so, similarly, if you were trading
16 in put options prior to the class --

17 **THE COURT:** Well, I understand this may inform the
18 measure of damages because there's been some critique that
19 people are looking at not the values immediately before the
20 statement, but some period of time before, which includes
21 market gains or losses, which are irrelevant from a causal
22 point of view.

23 **MR. ASHLEY KELLER:** That's right. That's the *Dura*
24 case.

25 **THE COURT:** Got it. Thank you.

1 **MR. ASHLEY KELLER:** Thank you, Your Honor.

2 **THE COURT:** All right. For Bridgestone.

3 **MR. ABADOU:** Good afternoon, Your Honor. Ramzi
4 Abadou. May it please the Court.

5 **THE COURT:** Thank you.

6 **MR. ABADOU:** Our view, and I think the view of
7 plaintiffs generally in this case, given the complaints that
8 have been alleged and filed, is that at this point it would be
9 a mistake, Your Honor, to limit the class in any way. These
10 are detailed, complex issues that all of us will sort out with
11 the benefit of expert analysis before a consolidated complaint
12 is filed and/or at class certification.

13 You can imagine somebody who purchased before Musk's tweet
14 on August 7th who held those shares through partial
15 disclosures, which almost every complaint before the Court,
16 that I think the Court is going to consolidate, alleges. The
17 truth doesn't always come out at once. If you're induced to
18 hold through a partial disclosure and you analyze that partial
19 disclosure, you may decide to sell; you may decide to hold.

20 So I think it's a mistake for plaintiffs, at this early
21 stage, to start discussing how we're going to deal with
22 damages.

23 Now, people may come back at the end of the case, if
24 there's a settlement or a resolution, and object at the plan of
25 allocation or object under Federal Rule of Civil

1 Procedure 23(e)(5) and say this doesn't make sense or this
2 isn't fair.

3 But Congress, in enacting the PSLRA, didn't design and
4 explain what "largest financial interest in the relief sought"
5 meant. It's one of the phrases in the statute that's not
6 defined. Most Courts have looked at it as a rough proxy for
7 recoverable losses.

8 And so I think the process the Court used today in
9 identifying the top three losers, for lack of a better word,
10 makes sense under *Cavanaugh*. Right? That's what *Cavanaugh*
11 teaches.

12 In 2002, Judge Kozinski wrote that this process is
13 straightforward and it's sequential. You start with the
14 biggest claim loss. You look at the arguments that are raised
15 about that loss.

16 Here, we've raised arguments about Tempus, OUF, and
17 whether or not the vast majority of their losses are --

18 **THE COURT:** And I will get to that.

19 **MR. ABADOU:** Okay.

20 **THE COURT:** So I'm not there yet.

21 So I've asked you to address one specific issue, and your
22 two minutes is just about up.

23 **MR. ABADOU:** Thank you, Your Honor.

24 **THE COURT:** All right. Thank you.

25 For Mr. Littleton.

1 **MR. PORRITT:** Nicholas Porritt, again,
2 Levi & Korsinsky. Thank you, Your Honor.

3 Mr. Keller did, in fact, anticipate the example I was
4 going to give. So, and I think he identified the long
5 positions and options.

6 Also included in the class in several of the complaints,
7 if not all of them, are also option holders who had short
8 positions, which may also involve purchases and sales,
9 depending on whether it's a put or a call.

10 When you have a price that's volatile during the class
11 period, as alleged, in response to various statements by
12 defendants, the stock price goes up; it goes down. There may
13 well be short sellers as well who also may have positions.

14 I think, in general, over the course of the class period,
15 it's the long positions that suffer the most losses; but there
16 may be short positions there as well, in addition to the shorts
17 who held --

18 **THE COURT:** Right.

19 **MR. PORRITT:** -- in the class period.

20 I think at this stage, I would agree that it's premature
21 at this stage. In every class -- in every securities class
22 action, you have members in the defined class who have suffered
23 no loss. In a conventional class action, you have the
24 so-called in-and-out purchasers who purchased during the period
25 of inflation before a corrective disclosure. They are defined

1 as purchasers during the period, but they are excluded, if you
2 like, from recovery, ultimately, in any settlement due to the
3 plan of allocation, the operation of the plan of allocation.

4 I think, Your Honor, here, looking at -- so I think it's
5 premature to start managing the class at this point. As
6 the Court observed, I don't think the Court has enough
7 information to do what is going to be a very complex job.

8 I think what the Court needs to -- what I would suggest,
9 respectfully, is that the Court needs to look ahead as to how
10 this is going to -- how these issues are going to come up in
11 the future, and ensuring here that the class, as a whole, is
12 represented and you have broad representation of the various
13 different constituencies.

14 Because if the class here is defined down to, say, just be
15 purchasers of common stock, for instance, the result is going
16 to be that the option holders are going to file a second case
17 in this court, which will end up back here before Your Honor
18 and you'll be facing this exactly. So I think it's more
19 efficient to have it all in one case.

20 **THE COURT:** Right.

21 **MR. PORRITT:** And the second thing that you may face
22 is, ultimately, should this result in a settlement -- I mean,
23 the straight liability questions -- What did Mr. Musk mean when
24 he made his tweet? What was his intent? -- are fairly
25 straightforward, and it's a very defined class period here.

1 The issue is all about the damages and who should be in the
2 class. That's the complexity here.

3 **THE COURT:** So let me ask you -- and I'm going to
4 shift a little bit rather than -- I'm going to give, now,
5 everybody who hasn't had a chance to talk to address the other
6 question I have, which is evolving out of what you just said;
7 that is, potential conflicts.

8 I understand it may be premature to try to manage the case
9 and do a pre-Rule 23 analysis; and yet I think I have to have
10 some understanding of what potential conflicts, if any, there
11 are. So I'd be curious what your -- one division is between
12 long and short. People who had to close the short during the
13 class period paid a higher price to put the stock back, and
14 they suffered. And, of course, people who purchased at the
15 height suffered. So they both have that in common.

16 Are there conflicts that you can foresee -- whether in the
17 way the class is managed, defined, litigated -- are there any
18 potential conflicts between long and short, just to put it in a
19 very rough way?

20 **MR. PORRITT:** I can foresee potential conflicts. It
21 really -- what it's going to depend -- and I think more
22 analysis needs to be done in terms of the reaction of the stock
23 price. And it's almost -- it's literally almost minute by
24 minute in this particular case for certain days, as to where
25 people placed trades and how that affects their particular

1 trading strategy at any particular point in time.

2 So I can see -- I can foresee down the -- down the road
3 that people will be claiming losses from different trading
4 strategies as a result from the same statement. I'm not sure
5 that's necessarily a conflict per se in the sense that I'm not
6 sure one class can't recover if the other class does. I mean,
7 they may be supplementary in that regard.

8 Where there may be a conflict is when you ultimately end
9 up, say, there is a resolution. I don't think I'm being too --
10 I'm not claiming too much degree of foresight to predict that
11 this case may end up with a settlement, as many of these cases
12 do, as opposed to trial. And if you end up with a settlement
13 fund, how that gets distributed between the various
14 constituencies, that is where I think a potential conflict
15 might arise at that particular point in time.

16 And that is where I think you almost want to get ahead of
17 it. That is going to occur, and you almost want to get ahead
18 of it by making sure the constituencies are represented in the
19 case throughout and are involved in the settling of the
20 settlement fund.

21 And if we end up with a dispute in front of Your Honor as
22 to how to divide up the settlement fund, at least everyone is
23 informed, and you don't have one person with a status of lead
24 plaintiff and everyone trying to sort of object. I don't think
25 that's a helpful aspect. I think it would be better if

PROCEEDINGS

1 everyone was being involved in setting up -- everyone wants the
2 biggest fund as possible. It may be in dividing it up that the
3 conflict arises.

4 **THE COURT:** All right. Thank you. Appreciate that.

5 **MR. PORRITT:** You're welcome.

6 **THE COURT:** So let me hear on that second issue --
7 because I think I've heard enough on the first issue -- from
8 Mr. David's counsel.

9 **MS. MYERS:** Good afternoon, Your Honor. Danielle
10 Myers on behalf of Dany David. May it please the Court.

11 With respect to the conflict issue, Judge Whyte -- and
12 that's Judge Whyte with a Y -- in the *McKesson* decision
13 actually considered the interests of several different
14 conflicting shareholders in their requests for appointment as
15 lead plaintiff, and specifically said that speculations about
16 possible conflicts at the lead plaintiff stage do not rebut the
17 presumption that one lead plaintiff can vigorously pursue all
18 available causes of action on behalf of all possible defendants
19 under all possible theories.

20 And we would submit to Your Honor that, yes, while this
21 case involves longs, shorts, and options transactions, there
22 are several movants before the Court that have invested in
23 those various types of securities.

24 And we've cited to Your Honor two Ninth Circuit decisions,
25 the *Hanon* case and the *Blackie* case, that talk about

1 sophisticated investors and reliance on the fraud-on-the-market
2 theory, which I think is really the crux of the question. And
3 both of those Ninth Circuit decisions, in addition to,
4 actually, the *Basic* decision from the Supreme Court, talk about
5 the theory that it's hard to imagine any type of investor that
6 doesn't rely on market integrity at the end of the day.

7 **THE COURT:** So would it be your view that a lead
8 plaintiff in this case could be comprised of someone or some
9 entity that only did short sales, because they relied on market
10 integrity, they were injured by the alleged fraud, et cetera,
11 et cetera? Is it your view, then -- this presumption that
12 anybody could be trusted and trusted to litigate the interests
13 of all sellers, what's your view on that?

14 **MS. MYERS:** As long as that short seller is typical
15 and adequate and purchased stock. Right? So the short seller,
16 as Your Honor recognized, actually did purchase to cover. So
17 as long as that short seller purchased to cover and suffered a
18 loss in reliance on the fraudulent -- allegedly fraudulent
19 statements during the class period and, obviously, meets the
20 typicality and adequacy inquiry, then, yes, Your Honor.

21 We also pointed the Court to both Judge Alsup's recent
22 class certification decision in the *LendingClub* case, where the
23 defendants in that case asked the Court proactively at class
24 certification to exclude short sellers. And Judge Alsup
25 declined to do that because the Court recognized that if you

1 exclude a short seller -- they are a purchaser -- and if they
2 purchased stock and lost on that transaction, they're entitled
3 to be in the class. And because the class definition said "and
4 damaged thereby," the short sellers didn't need to be excluded.

5 We also cited to Your Honor in our papers --

6 **THE COURT:** Is there a problem if a short seller
7 closed their sale, let's say, right at the height of the fraud;
8 and therefore, subsequent partial disclosures really had no
9 impact because they were out of the transaction; they already
10 paid the price at that point? Or that might affect those who
11 are in a long position or purchase position; there may be more
12 complicated -- I don't know -- causal questions. Do you see
13 any difference there?

14 **MS. MYERS:** I do see differences, depending on when
15 anyone bought and sold in the class period. If somebody bought
16 before Mr. Musk's tweet, they don't have a causation problem.
17 Right? So it's going to depend on the allegations of the
18 consolidated complaint, which is going to be up to the lead
19 plaintiff to frame and make sure that we allege concretely who
20 was harmed when by what.

21 And I do believe that a consolidated complaint by any
22 qualified lead plaintiff will be able to make sure that there's
23 a concrete, cohesive theory whereby every investor -- long,
24 shorts, and options -- there won't be conflicting theories of
25 the fraud as to the nature of each type of investment, if that

1 makes sense.

2 **THE COURT:** All right. Thank you.

3 **MS. MYERS:** Thank you.

4 **THE COURT:** Appreciate it.

5 Let me hear from Mr. Johnson's counsel.

6 **MR. KATHREIN:** Good afternoon, Your Honor.

7 **THE COURT:** Good afternoon.

8 **MR. KATHREIN:** Reed Kathrein.

9 I think you know from my papers that I'm probably the king
10 of conflicts here. I do see conflicts. I do see a big
11 problem.

12 I agree with Mr. Littleton that now's not the time to
13 exclude anyone from the class. We've got some pretty broad
14 definitions, and I think most all those definitions are
15 represented by people in the room.

16 But as I point out in our papers, that there are conflicts
17 which will arise if there's a limited fund here. And I'm
18 assuming that Tesla is a limited fund.

19 We haven't even tried to determine how much the options
20 damages are. But just in long damages, or those who just
21 purchased based on volume and an inflation of about \$19 or
22 39 -- I'm not sure which one offhand -- back-of-the-pocket was
23 about 700 million, maybe a billion dollars in damages,
24 excluding options. It could be much more.

25 But we do think everyone should be included. And I think

PROCEEDINGS

1 people here are demonstrating that people do stand in different
2 shoes and have different interests in mind. I think it's -- it
3 would be folly to think that one party would be able to cover
4 everyone's interests and represent everyone's interests.

5 I will say that another example, we do have people like
6 Mr. David who started out the class period being short. He
7 shorted immediately after the tweet and then, the next day,
8 covered it at a profit. So even they may be in a different
9 shoe. They may want to start out with a class that covers
10 sellers.

11 So in our case, I don't want to talk about the particulars
12 of any individual plaintiff or the value. I think you're going
13 to get to those later.

14 But we do see that the three buckets of shorts -- and by
15 that, I mean people who were short before the class period and
16 then covered during the class period should be one basket --
17 longs, people who just bought during the class period, weren't
18 covering a short.

19 And the reason for that distinction is because, we talked
20 to many short sellers, and we told them that: Your damage
21 theory is going to be different because you have an actual loss
22 between what you paid -- what you sold the stock for at the
23 short -- many of them were selling at 300 -- and 389, where you
24 covered. That's what you guys want, and if I was representing
25 you, that's what I would argue for.

1 But that's a huge dollar amount, and it's really going to
2 eat up any settlement; whereas representing the long
3 purchasers, just those who purchased, it's pretty well
4 determined by the law that we're looking at the inflation. And
5 that's how much the stock went up and went down as a result of
6 his tweet. And it's -- I believe it's approximately \$39.

7 That is a huge difference between an \$89 damage.

8 **THE COURT:** Well, does that suggest that we should
9 start thinking about subclasses now, between long and short,
10 because of the different damages approach and the likely
11 potential of looking at a limited fund?

12 **MR. KATHREIN:** That's what I'm suggesting, Your Honor,
13 because ultimately, you're going to have a conflict on those
14 theories and it's better to get them all at the table now
15 rather than see a settlement and a preliminary approval of a
16 settlement and then wait for objectors to come in. And it will
17 also give defendants the shot to come in and argue their
18 position up-front.

19 So I do suggest that we have three subclasses: a class
20 of short, a class of long, and a class of options.

21 And options have so many different variables to argue
22 about. I'm not sure that I would be -- want -- that I would
23 even want to represent them and argue about things such as
24 strike price, duration, volatility, maturity. So in this -- in
25 this circumstance, I think that we should be looking at

1 subclasses.

2 **THE COURT:** And what does that imply for the decision
3 now before me with respect to lead plaintiff?

4 **MR. KATHREIN:** I think you should appoint a lead for
5 longs, and basically, I think the two contestants there would
6 be Tempus and the Tesla Investor Group.

7 Options, that would be Mr. Littleton and --

8 Mr. Ramzi, your client, I don't remember his name.

9 **MR. ABADOU:** Bridgestone.

10 **MR. KATHREIN:** And then out of the longs, I think it
11 would be Mr. Johnson and FNY.

12 I think Mr. David starts the period with a short position,
13 purchasing shorts, and I think he should be excluded.

14 **THE COURT:** All right. Thank you.

15 Let me hear from FNY. And you can comment on that last
16 point too.

17 **MR. SELTZER:** Yes, thank you, Your Honor. Marc
18 Seltzer, Susman Godfrey, on behalf of FNY.

19 I agree with what Mr. Kathrein just said. I don't think
20 you need a crystal ball to see that there are very divergent
21 interests here between the people who bought stock long, the
22 people who shorted the stock, and options traders.

23 With respect to the short sellers, they have a very
24 different theory and approach to this case than somebody who
25 bought the stock long. They are ones who essentially were

1 discounting the market price, thinking that the stock was
2 overvalued and the stock would fall. And then when the tweet
3 happened, afterwards, they covered. They weren't forced to
4 cover, but they did cover.

5 What happened afterwards to the price of the stock upon
6 disclosure is really irrelevant to their case, but it's
7 critical to the long purchasers, to establish that the
8 disclosure revealed a falsity in the statements that Mr. Musk
9 made which caused the stock to drop. That's one issue that
10 they have.

11 The second issue is one of becoming subject to a potential
12 defense of lack of reliance. It's not hard to see that the
13 defendants would argue that a short seller can't argue that the
14 short seller relied upon the integrity of the market price of
15 the stock when they believed that the price was overstated.
16 That, again, is a critical distinction between the short
17 sellers and people who are buying on the open market, buying
18 the stock long.

19 **THE COURT:** Repeat that point again, that there
20 couldn't be reliance on the integrity of the market?

21 **MR. SELTZER:** In other words, if you're selling
22 short --

23 **THE COURT:** Yeah.

24 **MR. SELTZER:** -- you're someone who is subject to a
25 defense that you're not relying upon that the market price is

1 validly setting the price of the stock.

2 That's the fundamental assumption of the
3 fraud-on-the-market theory in *Basic against Levinson* and,
4 before that, *Blackie against Barrack*.

5 If I'm selling short, I'm testifying by my conduct that
6 the market price is not validly set. I'm saying that it's
7 overstated. So in that sense, I'm subject to a defense that I
8 would not be relying upon the integrity of the market in
9 selling the stock short. That would be the focus of an
10 argument that you could anticipate the defendants would make
11 that they can't make against somebody who's buying the stock
12 long.

13 Second, Your Honor, with respect to the derivative
14 purchasers or traders, they have such a complicated different
15 approach to the valuation of their securities than would a
16 common stock purchaser. As Mr. Kathrein mentioned, you look at
17 issues in applying the Black-Scholes model of volatility,
18 duration, maturity dates, the level of short-term interest
19 rates, none of which are relevant to the question of proving
20 the long purchasers' claims.

21 So as I said at the outset, Your Honor, you're not going
22 to need a crystal ball to see that there are going to be very
23 divergent approaches here; and you might as well resolve it
24 now, because each group, I think, deserves their own
25 representative who would adequately represent their interests

PROCEEDINGS

1 and make the arguments on behalf of these groups without being
2 weighed down with trying to resolve and represent groups that
3 have conflicting interests.

4 **THE COURT:** Well, aren't those -- I understand how the
5 damages analysis and perhaps some of the substantive analysis
6 might diverge. Maybe you can explain to me why they
7 necessarily conflict.

8 Why couldn't somebody who had both a long and a short
9 position be able to argue without tension between them?
10 Assuming no limited fund and we're not talking about competing
11 for a finite, you know, zero-sum game, but just advancing
12 litigation, why are those inconsistent?

13 **MR. SELTZER:** Well, if you look at the damage
14 approach, for example, the short sellers are saying -- and this
15 is how they measure their losses in their papers -- that "We're
16 entitled to damages based upon the price that we sold short and
17 the price that we had to cover."

18 That has nothing to do with the common stock purchasers.
19 Their --

20 **THE COURT:** But it's based on the theory that had it
21 not been for the fraud, their cover price wouldn't have been so
22 high. It would have been covered a lot easier. So they lost
23 that margin.

24 **MR. SELTZER:** Now get into what's the difference in
25 the inflation. What piece of the inflation would they be

PROCEEDINGS

1 proving is due to Mr. Musk's tweet? What portion is due to the
2 inflation they thought already was built into the securities?

3 The common stock purchasers aren't going to have that kind
4 of difficulty in apportionment. They can make their argument,
5 and their expert reports deal with what the price would have
6 been based upon the factors they take into account, not some
7 factors that the short sellers obviously acted on in selling
8 short.

9 So there's a real tension here in terms of --

10 **THE COURT:** Again, I'm not sure where the tension is.
11 One may be predicated on a number of factors that don't inform
12 the other analysis. But it's conceivable one could have one
13 number for their damages and the other group, because they have
14 a different theory, have another number. But it's not clear to
15 me how they conflict.

16 **MR. SELTZER:** Because if you look at what the experts
17 would say -- What would the price have been absent the
18 tweet? -- that's what the experts for the common stock
19 purchasers, the long purchasers, would be testifying about.

20 **THE COURT:** Yeah.

21 **MR. SELTZER:** What would the short sellers' expert be
22 testifying about? What difference -- what difference would the
23 price have had -- had been, taking into account the fact that
24 they believed that the stock was overstated at the time that
25 they shorted the stock?

1 In other words, you're going to have conflicting expert
2 reports about what the damages are in this case; and that's a
3 built-in inherent conflict in terms of the litigation strategy
4 and approach. And that's why --

5 **THE COURT:** I guess I'm not -- maybe I'm simplifying
6 things. At the end of the day, it's causally related. Why
7 isn't it the same question? Had Mr. Musk not tweeted what he
8 did compared to the market -- the actual market given the
9 tweet, there's a certain delta there. And I'm not sure why
10 they may have -- shorts may have different expectations,
11 different analysis, different investment strategies; but at the
12 end of the day, it's how is it divorced from that delta?

13 **MR. SELTZER:** Because the delta that the short sellers
14 would want to prove is different than the delta that the common
15 stock purchasers would want to prove. That's the difference.

16 **THE COURT:** That's what I'm trying to understand.

17 **MR. SELTZER:** Because the short sellers have to take
18 into account the fact that when they sold short, they thought
19 the price was already inflated. The common stock purchasers
20 wouldn't take that position.

21 **THE COURT:** Well, that may have been their
22 expectation, and they may have been wrong due to market forces
23 that they didn't anticipate. But those market forces are not
24 part of the damages, I would think. The only part of the
25 damages are those causally related, whether you sold short or

1 long, to the tweet.

2 **MR. SELTZER:** But it's not market forces. They're
3 saying that the market wasn't validly setting the price at the
4 time that they shorted the stock. That's a big difference than
5 the position that the common stock purchasers would be taking,
6 that at all times the market was reflecting all the available
7 information and was fairly pricing the stock until it was
8 impacted by the false tweet that Mr. Musk made. That's a very
9 big difference in approach.

10 And, Your Honor, with respect to these issues, there are
11 cases that are directly on the money. You have the *Zlotnick*
12 case, which is cited in the papers, which says that short
13 sellers can't represent long purchasers. And there are other
14 cases that stand for that proposition.

15 This is not something that is a brand-new concept that is
16 being introduced in this case. There are other cases cited in
17 the papers that stand for exactly the same proposition and go
18 into some detail as to why there is this conflict of position.

19 And, again, you also have the question that -- the
20 question that their lack of reliance is going to be a focus of
21 litigation. That shouldn't be an issue that impacts negatively
22 the long purchasers. They should have their own plaintiff that
23 isn't subject to that kind of a defense.

24 **THE COURT:** Have there been any cases -- and is the
25 case you just cited, was that decided in the context of class

1 cert or in the context of selecting proposed lead counsel in
2 the PSLRA case?

3 **MR. SELTZER:** You know, I believe the case I just
4 mentioned was in the context of class cert, but I'd have to
5 double-check to be sure.

6 **THE COURT:** Are there any cases that have decided to
7 take this issue on and inform the way the Court decided to
8 choose lead? Because it almost makes the Court decide the
9 Rule 23 question up-front.

10 **MR. SELTZER:** Well, in a way, it anticipates the
11 Rule 23 question.

12 But as a question of case management, as I said, it's not
13 going to take a crystal ball to see that these issues are going
14 to come to the --

15 **THE COURT:** Well, it may take a crystal ball to find
16 out exactly whether the conflicts in the different approaches
17 are actually conflicting and irreconcilable.

18 And I have to balance that against, yes, ideally, perhaps
19 we would have lead plaintiff and lead counsel for every group
20 that has a different theory. In your case, you're proposing
21 three. But that complicates the manageability, the efficiency,
22 and everything else in this case at the beginning point, partly
23 as a prophylactic measure to anticipate what you think is going
24 to be a problem down the line. But it also means we've now
25 sort of tripled the expenditure of this case and committed to

PROCEEDINGS

1 it up-front, which I'm a little hesitant to do this early on
2 without having a full, robust Rule 23 analysis.

3 **MR. SELTZER:** Well, there are cases that have
4 separated out representation at the outset. The *BP* case is one
5 that did that at the time of the appointment of lead
6 plaintiffs, where the Court anticipated there would be the
7 kinds of issues in terms of separate interests being pursued in
8 different ways by different groups of plaintiffs.

9 I say, Your Honor, that I understand the desire to have
10 this as simple as possible, but what you have is the notion
11 here of having such a heterogeneous class that includes people
12 with conflicting interests, to say that it should be
13 represented by one lead plaintiff at this juncture when you can
14 see fairly readily down the road that it's going to be
15 separated out anyway, so you're going to have that division of
16 responsibility ultimately in this case --

17 **THE COURT:** All right. Let me ask you two questions,
18 then. What about you have a situation where you have some
19 proposed lead plaintiffs that cover a couple of these bases,
20 that are common stock purchasers as well as option traders.
21 You have some that actually were on all sides of it and had
22 some short, some long, some --

23 **MR. SELTZER:** Yes.

24 **THE COURT:** So why wouldn't a simple-minded approach
25 be, well, let's minimize the number of plaintiffs. We can

PROCEEDINGS

1 select the plaintiff that kind of had all three experiences, or
2 at least two of those, as opposed to three separate. Why not
3 semi-consolidation?

4 **MR. SELTZER:** It would be like -- and this may be an
5 extreme hypothetical. Imagine one lawyer representing three
6 clients at the same time, each suing the other. It would
7 simplify the proceeding there, that one lawyer in court
8 representing all three, but it would be a divided loyalty.
9 That lawyer would be asked to assume, which would be
10 contrary --

11 **THE COURT:** Doesn't that assume that the parties are
12 completely adverse? Whereas here, there is one common thread.
13 I mean, you want to say, whatever position you're in, that
14 Mr. Musk violated the law when he did, allegedly, what he did
15 and there were consequences in the market because of that.

16 **MR. SELTZER:** I understand that, but then you have
17 different groups of people who were differently harmed,
18 according to their allegations, by what he did. And the
19 proof -- the method of proving how they were harmed, the
20 mechanism of that harm is going to be very different and at
21 odds with each other, in terms of how they present their cases.

22 That's the nub of the problem here.

23 **THE COURT:** All right. Let me hear -- and I'll just
24 throw this open to anybody else on the plaintiff side that has
25 a differing view with respect to the need to sort of subdivide

1 at this point.

2 **MR. SELTZER:** And, Your Honor, if I may, just one last
3 comment. The *Aronson/McKesson* case was cited. That was a
4 case, there was an option issue in that case; but there were
5 plaintiffs arguing, well, you have to have a separate plaintiff
6 for a 10b5 claim and a separate plaintiff for a 14(a) claim and
7 a separate plaintiff for a Section 11 claim.

8 There was no need to do that. And the Court said the mere
9 possibility of a conflict that was, you know, entirely
10 theoretical didn't justify separating out the plaintiffs at
11 that point in time.

12 In the *Blackie versus Barrack* case that was cited, there
13 the issue was, Your Honor, there was a years-long fraud that
14 took place and there was an accelerating fraud, and the issue
15 was whether or not there was some conflict in the plaintiffs in
16 terms of the position they would take on damages on behalf of
17 all of the purchasers of the stock.

18 **THE COURT:** All right. Thank you.

19 **MR. SELTZER:** Very different case.

20 **THE COURT:** All right. Let me hear from the --

21 **MR. SELTZER:** Thank you, Your Honor.

22 **THE COURT:** If you'd state, again, for the record.

23 **MR. ABADOU:** Ramzi Abadou on behalf of Bridgestone,
24 Your Honor.

25 I do take a different view, but I think there's something

1 more important than that, which is I think the Ninth Circuit
2 takes a different view. And we cited this at ECF 123 at the
3 ECF pinpoint 12 in our brief.

4 And I think it's very important for the Court to consider
5 this decision by the Ninth Circuit in a case called
6 *In re Cohen*.

7 And many of the movants who've asked for separate
8 representation -- and I know why they're doing it -- have done
9 so to get a position in the case.

10 But the Ninth Circuit said, in dicta, in a footnote,
11 sua sponte but it's still very important, that:

12 "The appointment of multiple lead plaintiffs
13 would . . . tend to run counter to the sequential inquiry
14 we outlined for selection of lead plaintiff."

15 In *Cavanaugh*.

16 And the Court says:

17 "Although none of the parties raise the issue, the
18 district court may have erred in appointing 'co-lead
19 plaintiffs,' a practice occasionally employed by district
20 courts."

21 What's fascinating about that, Your Honor, is in that
22 footnote, the Ninth Circuit panel cites two decisions: *Yousefi*
23 *versus Lockheed Martin* out of the Central District of
24 California -- I believe it's a 1999 case -- and Judge Briant's
25 case, *In re Oxford Health*, where the Courts did precisely what

1 you're asking about, after the mandatory 60-day deadline,
2 grouping together different investors with purported different
3 interests.

4 And the Ninth Circuit, I think, in *Cohen* was very
5 concerned about this because it tends to run afoul of
6 *In re Cavanaugh*, which is 306 F.3d 726, and I think the
7 substantive discussion is at 730 through 732. And I think as
8 the Court is grappling with these issues, it ought to consider
9 what the Ninth Circuit said in *Cohen*.

10 Now, as a matter of practicality, this isn't the first
11 time courts have had to grapple with arguments of competing
12 interests and intra-class conflicts. Arguably, the most
13 complex case that I'm aware of that was litigated in post-PSLRA
14 times is *In re Enron*. And Judge Harmon's decision, which we
15 cite in our papers, deals with this very issue. She had
16 bondholders, short sellers, options traders. And what she did,
17 and what other judges who have been confronted with these
18 subclass arguments have done, is said one lead plaintiff and
19 one lead counsel can represent the interests of all investors.

20 At the end of the day, all of us on the plaintiff side are
21 on the same team. Our job is to maximize the recovery for the
22 class.

23 Bridgestone, as the Court may know, has losses on common
24 stock and options, which is important, but it's not the
25 critical point. The critical point under *Cavanaugh* is losses

PROCEEDINGS

1 suffered in sequential inquiry. The Ninth Circuit specifically
2 says in *Cavanaugh* it's not a relative inquiry. This is not a,
3 quote/unquote, beauty contest where, you know, firms talk about
4 how great they are and how the plaintiffs talk about -- I think
5 the Labaton group talked about its group being elegant. That's
6 not what this is about.

7 The other thing the Ninth Circuit said in *Cavanaugh* is
8 that you don't do this on a round-robin basis.

9 And so I was -- you know, it's one thing that I teach my
10 students at Berkeley Law is, if there's binding authority that
11 may not be good for you, you've got to point it out to
12 the Court. You have to point it out to the Court.

13 So now we have a filing that was submitted, I believe,
14 yesterday, Your Honor, by FNY and Mr. Johnson. Didn't comply
15 with Rule -- Local Rule 73(d). They didn't get permission from
16 the Court to file a supplemental brief. They effectively filed
17 a new lead plaintiff motion --

18 **THE COURT:** No. I understand that. I'm not here --
19 we could be here all day if we're going to start --

20 **MR. ABADOU:** Sure.

21 **THE COURT:** I'm not interested in going down that
22 road.

23 Let me hear from anybody else who has a comment about --

24 **MR. ABADOU:** Thank you.

25 **THE COURT:** Thank you.

PROCEEDINGS

1 -- about whether there is such an obvious conflict at this
2 point that the Court would be advised to start dividing up lead
3 plaintiffs.

4 **MR. ASHLEY KELLER:** Thank you, Your Honor. Ashley
5 Keller again for the Tesla Investor Group.

6 I, too, will make a statement against interest here. If
7 the Court were to subdivide the groups, the Tesla Investor
8 Group has Dr. Shirazi, which is the largest single long-only
9 purchaser. But nonetheless, we didn't advocate that the Court
10 break things up because we don't think that that is warranted
11 or appropriate here under the law.

12 That having been said, there are potential tensions and
13 conflicts between the various constituencies here that are
14 still grounded in economic common sense.

15 A point to make, though, is that I don't think that
16 there's a conflict necessarily between shorts and longs who are
17 buying shares of a security. A long buys shares to open a
18 position. A short, covering, buys shares to close out a
19 position. But as Your Honor alluded to previously, they're
20 both buying shares, and they're both buying at an artificially
21 inflated price tainted by fraud. And so the damages measure is
22 going to be the difference between the fraud-tainted price and
23 the price that ultimately would have obtained had there not
24 been fraud. So there's really no tension there as a result of
25 the price inflation, nor is there a tension because of fraud on

1 the market.

2 I have to confess, there are some cases that say short
3 sellers can't represent a class because they don't have the
4 presumption of reliance; but with all due respect to the
5 jurists who issued those opinions, they're just flat wrong.

6 If you buy a share of stock, you also don't believe in the
7 market price if you're long. You think that the stock price is
8 going to appreciate. Everybody who trades in the stock market
9 does it to make money, and so they don't believe that the
10 current clearing price is the one that's going to obtain in the
11 future.

12 A short seller believes in the future the stock's going to
13 go down; a long buyer believes in the future the stock is going
14 to go up. They both have to get the presumption of reliance or
15 nobody does. And so that's not the reason that there's a
16 tension in this case.

17 The real tension in this case comes between those, at
18 least on the stock side -- and we can talk about options in a
19 moment. But on the stock side of the ledger, the real tension
20 is between those who purchased immediately after the tweet, the
21 first moments of the class period, and those who purchased
22 later in time.

23 This is not the sort of securities fraud case where you
24 had a fraud that was put into the market, it artificially
25 inflated the price of the stock, and then at some discrete

PROCEEDINGS

1 future moment in time, there was a corrective disclosure, the
2 stock price dropped, and then everybody could say, "Oh, look at
3 the difference in price the moment before and the moment after
4 the corrective disclosure. We now can measure everybody's
5 damages."

6 This was a series of dribs and drabs of information coming
7 out where the market got partial corrective disclosures, but
8 then the defendants came out with new statements that gave
9 false hope once again to the company going private at 420 a
10 share. And so people could reasonably rely for lots of periods
11 of time over the proposed class period here, August 7th through
12 August 17th, on the misinformation that was being put into the
13 market.

14 If you purchased a share of stock, whether to cover or
15 just to go long, immediately after the tweets, you're in a very
16 different position, from an incentives perspective
17 economically, than someone on the 17th.

18 And so rough back-of-the-envelope damages, whether you say
19 it's \$700 million or a couple of billion dollars, roughly a
20 third of the damages can be measured, if you're looking at the
21 90-day lookback price, on the first day of the tweet.

22 The bulk of the damages, two-thirds of the damages are for
23 purchasers or sellers of securities, purchasers of stock or
24 sellers of puts that happened on August 8th through
25 August 17th.

1 Folks like Tempus and OUF have zero economic incentive to
2 protect the interests of those absent class members because
3 they covered their position exclusively on the first day of the
4 class period. That's a real tension.

5 Yes, they want to fight for a big pot of money from Tesla;
6 but to the extent that Tesla came to them and said, "Hey, let's
7 agree that the class window is really just a day" -- and make
8 no mistake -- and you can ask the defendants here, if you'd
9 like -- they are going to hotly dispute the class period
10 running all the way through August 17th. They'd like to cabin
11 their exposure and say that the market became aware of the
12 misinformation far earlier. And so it's going to require
13 zealous advocacy to get that type of class period.

14 **THE COURT:** So if there's an investor group or
15 investor that engaged in transactions throughout the class
16 period, that would be an ideal lead plaintiff?

17 **MR. ASHLEY KELLER:** Yes. And you'll be shocked to
18 know that the Tesla Investor Group has.

19 **THE COURT:** Surprise, surprise.

20 **MR. ASHLEY KELLER:** Yes. But, so the economic points
21 here, though, are important. And I would refer the Court to
22 the expert declaration that we had submitted from
23 Professor Daines from Stanford --

24 **THE COURT:** Right. Thank you.

25 **MR. ASHLEY KELLER:** -- who's a law and economics

1 person.

2 **THE COURT:** All right. Thank you.

3 **MR. ASHLEY KELLER:** Thank you, Your Honor.

4 **THE COURT:** Chance for rebuttal, I guess.

5 **MR. CHOI:** Yes. Thank you very much. Mario Choi for
6 Tempus and OUF.

7 I strongly disagree with my learned colleague there. As
8 Tempus and OUF have submitted declarations, there's no question
9 that Tempus and OUF will represent the interests of all
10 individual purchasers or sellers who have been damaged by the
11 misrepresentations made by Tesla and Mr. Musk.

12 And numerous courts have actually rejected this
13 front-loading argument. For instance, Judge Alsup, in *Luna*
14 *versus Marvell*, in a class certification case, pointed out that
15 this equity conflict is present in almost every large case.
16 And there's not a reason to make this suggestion that Tempus
17 and OUF would not duly represent the putative class.

18 **THE COURT:** Let me ask you, since you're here. I did
19 want to ask you the question about the magnitude of the
20 asserted damages and the contention that the 15.8 million was
21 vastly overinflated because it's not just the loss that
22 occurred, but it's the loss that should be measured as to what
23 the -- perhaps the sale price would have been just immediately
24 before the tweet and compared -- relative to the closed-end
25 price during that period, not the actual purchase price -- or

1 not the actual beginning of the transaction, because that takes
2 into account all sorts of other market things that have nothing
3 to do with it.

4 So if you look at the time period, if you try to
5 extrapolate, at least one estimate was that your losses are
6 more in the range of 3.386.

7 **MR. CHOI:** 3.4.

8 **THE COURT:** Something like that, yeah, as opposed to
9 15.8.

10 What do you say to that?

11 **MR. CHOI:** I say to that, that -- and prove me if I'm
12 wrong by my colleagues -- but everybody, every movant in this
13 case did what we did. We looked at the sales -- in our case,
14 we looked at the sales price; we looked at the purchase
15 price --

16 **THE COURT:** Actual sales price.

17 **MR. CHOI:** -- the actual sales price; we looked at the
18 actual purchase price; and we did the deduction.

19 Every single movant here did the same thing.

20 **THE COURT:** Well, but does that make it right? If
21 you're doing a short sale, why should the actual sales price
22 make a difference when, prior to the tweet, things, let's say,
23 didn't go the way you expected, your investor didn't expect?
24 Why should that be included in the aggregate damages to be
25 recovered? It's not causally related to the tweet.

1 **MR. CHOI:** Well, Your Honor, at this point I don't
2 think it's necessary to describe -- to go into that issue of
3 damages.

4 **THE COURT:** Except when I've got to decide who's got
5 the largest -- I have to do some rough -- this is what's
6 complicated. Now you want me to Rule 23 it. Now you want me
7 to do a damages assessment as if we're at trial or something,
8 and there's even a request to do discovery. So I do have to
9 look at that, and there's a big difference between 15.8 and
10 3.4.

11 **MR. CHOI:** Well, Your Honor, we submit that we did
12 what was required of us. We looked at the prices that we, in
13 this case, shorted; and then, because of the tweet that -- the
14 tweets that Mr. Musk presented, we bought to cover those
15 purchases. So in that case, we relied on the market and
16 relied -- Tempus and OUF relied on the information provided in
17 the market to make that decision to purchase.

18 Therefore, we submit that the way that we have handled the
19 purchase pricing and the sales pricing and doing the
20 subtraction makes us the largest.

21 And going into the discovery issue, just to cover -- just
22 to cover that basis, our reply brief essentially answers
23 everything that the Left movant group has requested of us.
24 So --

25 **THE COURT:** Okay. I appreciate it. Thank you.

1 Along those same lines, let me ask the Bridgestone
2 representative the specific question about a large portion of
3 the claim damages here, the 3.8, 3.9, I think it is --

4 **MR. ABADOU:** Yes, Your Honor.

5 **THE COURT:** -- includes -- there's some question about
6 I think it was some call options at -- I don't know if it was
7 the strike price or the price that --

8 **MR. ABADOU:** Oh, sure.

9 **THE COURT:** -- didn't make a whole lot of sense
10 relative to what Mr. Musk said.

11 And how could it be causally related to the tweet?

12 **MR. ABADOU:** Sure, Your Honor.

13 That's the January 2019 call, I believe, with a strike
14 price of \$450. What they're arguing, essentially, is that the
15 tweet said 420. Right? We've secured funding or funding
16 secured at \$420.

17 And I think the argument that's being made is that there's
18 no reliance there because they are assuming, incorrectly, that
19 he didn't rely -- Bridgestone -- I'm sorry. Mr. Liu is here --
20 but Bridgestone didn't rely on the tweet in making that
21 investment. It's incorrect. Bridgestone did rely.

22 And there's absolutely nothing inconsistent with the 450
23 strike price because what you're saying is, what you think, as
24 a long investor, is that this is going to be a really good deal
25 and it's going to go for more than 420. People are going to

PROCEEDINGS

1 get on board with this private transaction. The stock market
2 is going to support this move, and it's going to go to 450.

3 So to the extent that they're arguing that there's no
4 reliance, they're simply incorrect. Mr. Liu, on behalf of
5 Bridgestone, certainly relied on the tweet in purchasing that
6 particular option. And like I said, he's here today. I think
7 he's the only one amongst all the proposed lead plaintiffs who
8 actually showed up today.

9 **THE COURT:** All right. Let me ask you one other
10 question vis-à-vis Mr. Littleton.

11 I think Mr. Littleton's pitch is that Mr. Littleton
12 covered both long and short, as well as options and stock
13 purchases; whereas Bridgestone appears to only have gone long.
14 Is that right?

15 **MR. ABADOU:** That's correct. Mr. Liu and Bridgestone
16 were long. Unlike a lot of investors, he believed in Tesla;
17 investors here who lost, who bet against the company. He
18 drives a Tesla. He believed in the company. He was excited by
19 this news about perhaps a going-private transaction.

20 And the statement turned out -- and I don't want to risk
21 defendants' ire, so I'll throw in the word "allegedly." You
22 know, the statement was false, and the complaints allege that.
23 So I think that that's incorrect.

24 And I'll make one other note, again, Your Honor, and it's
25 a process issue, which is, you know, I looked at this Court's

PROCEEDINGS

1 prior rulings on arguments raised for the first time on reply.
2 And personally, it drives me nuts when I see them. And I'll
3 quote this Court, where you said:

4 "This Court shall not consider these arguments as
5 they were not raised until the reply brief."

6 And that's *Duarte versus Freeland*, 2008 U.S. District
7 6147.

8 Mr. Littleton could have raised what I view is a pretty
9 terrible argument on opposition. He didn't, and he waited for
10 the reply to make the argument. It's unfair. It's somewhat --
11 I mean, I think that kind of process has turned this into a bit
12 of a free-for-all.

13 So I'm glad that, you know, the Court has imposed some
14 order on this process today, because I think that's consistent
15 with what the Ninth Circuit has asked of us and has asked of
16 the district courts in *Cohen* and *Cavanaugh*.

17 **THE COURT:** All right. Let me give Mr. Littleton's
18 counsel a chance to respond and to address the question.

19 If you look at the claimed losses here, I think your claim
20 was 3. -- close to 3.5 --

21 **MR. ABADOU:** Thank you, Your Honor.

22 **THE COURT:** -- 3.6 --

23 Thank you.

24 -- whereas the Bridgestone Investment is 3.861, but you
25 question some of that.

1 So I'll give you a chance, number one, to respond to the
2 reply problem; but, also, just as importantly, if not more
3 importantly, how do you turn the edge if one were just, for
4 instance, looking comparatively at these two?

5 **MR. PORRITT:** Yes, Your Honor.

6 On the reply issue, I think there were -- the lead
7 plaintiff process under the PSLRA is somewhat unusual because
8 you almost need four rounds, because the opening briefs, you
9 have no idea of what -- who else -- who your opponents are when
10 you first move --

11 **THE COURT:** Felt like 21 rounds to me, 7 times 3.

12 **MR. PORRITT:** So I sympathize with the Court in that
13 regard.

14 But -- so you don't really -- the arguments often don't
15 get fleshed out until the opposition briefs come in, and then
16 the reply briefs really function as opposition briefs.

17 So, you know, I think it was fairly raised in the reply
18 brief.

19 We do have questions. We did have questions about the
20 reasons for that trade. I don't find the explanation terribly
21 convincing. I think it is --

22 We have heard from defendants, speaking briefly, that they
23 are going to go directly at a motion to dismiss phase; and
24 then, presumably, if it gets into discovery and class
25 certification, at these questions of reliance.

1 People's individual trading strategies are going to get
2 examined, and this is one which just does not make sense,
3 frankly. And, because if you believe the tweet, then the price
4 is not going above 450. So -- or above 420 to reach the 450
5 strike --

6 **THE COURT:** Well, I guess one would ask -- I don't
7 remember what the expiration date was, but if the expiration
8 date -- I don't know if it went well past or what it was, but
9 it's conceivable that the tweet at 420 might have signaled
10 that, well, 450 is not out of range either.

11 **MR. PORRITT:** I think that's a stretch. And, once
12 again, it's more as if, do we want to have this litigation --
13 do we want that to become an issue in this litigation, is the
14 question at this point in time.

15 **THE COURT:** And your position is that does account for
16 about 1.6 million of the -- do I recall? Or --

17 **MR. PORRITT:** Yes, Your Honor.

18 So the question is -- the other issue we raised was, we
19 don't know the timing of exactly when those options were
20 purchased. And if they were purchased, obviously, before the
21 tweet, then obviously they're not part of the case. And the
22 strike price suggested that perhaps they weren't responding to
23 a tweet suggesting a going-private transaction of 420.

24 So that was really just the question we're raising.
25 Obviously, we do not have discovery at this point in time.

1 So, I mean, I would point out, also in the context of
2 Bridgestone, I think their counsel's presentation here today
3 has made clear that they don't feel able to represent short,
4 people that are short positioned during the class, who are --
5 and that raises the issue, nonetheless, they are advocating
6 that they could represent shorts or there should be just one
7 representative.

8 I think the --

9 **THE COURT:** Part of your pitch, quote/unquote, is that
10 you've got all bases sort of covered.

11 What about the defense argument or the other arguments
12 I've heard about inherent conflicts, that there are competing
13 theories of recovery and reliance, et cetera, et cetera?
14 Can Mr. Littleton ethically and effectively represent all
15 phases?

16 **MR. PORRITT:** I think "yes" is the short answer, and
17 I'll explain why.

18 So what is important here, I believe, is that all those
19 constituencies are represented throughout the class -- the
20 period.

21 It's been advocated on behalf of both defendants, for
22 pragmatic reasons, and Bridgestone here that there should be
23 one lead plaintiff, the Enron approach, if you like. One lead
24 plaintiff could represent everybody, no matter what their
25 interests were.

1 We cited several examples in our brief about cases where
2 that has not worked; where members of the class, when an
3 amended complaint is filed, option holders get dropped out;
4 certain people get dropped out and excluded from the class, and
5 because that lead plaintiff has no interest and an opt out in
6 good faith of that lead plaintiff in assessing that maybe those
7 people shouldn't be in the class or they don't have strong
8 claims, but you want someone with some skin in the game on
9 behalf of those people to be making that decision.

10 And so I agree with Mr. Keller's submission that you want
11 someone who really represents over the entire time period and,
12 also, the general classes of investments to be involved in the
13 decision-making at all aspects of all times of the case and to
14 be here fighting when they're attacking those particular
15 claimants while --

16 **THE COURT:** And you contend that Mr. Littleton had
17 transactions throughout the entire class period?

18 **MR. PORRITT:** He did have transactions throughout the
19 class period. He had long and short during the entire class
20 period. Not quite every day, but most days. And so he has
21 direct skin in the game. It will cost him money to let go
22 short claims, for instance.

23 So I think he would be a very effective advocate in that
24 regard because he has a direct financial interest. And that,
25 after all, is what the PSLRA says, that financial interest is

1 the best proxy to be the best monitor and the best advocate on
2 behalf of the class.

3 **THE COURT:** All right. Let me hear from the Tesla
4 Group as the last thing I want to talk about, and that is the
5 issue about whether they should be considered a group and
6 whether the aggregation is appropriate, or whether this is a
7 lawyer-driven group of previously unrelated, disparate
8 investors who are put together solely for the purpose of
9 aggregating to meet the PSLRA number, not to tilt the question
10 or anything.

11 **MR. CHRISTOPHER KELLER:** This is -- I'm Chris Keller
12 with Labaton Sucharow on behalf of the Tesla Investment Group.
13 May it please the Court.

14 All groups are not similarly situated. There are many
15 courts that routinely appoint groups, particularly in the
16 Northern District of California, so long as the group appears
17 and is demonstrated, through record evidence, that they can
18 operate as a distinct group.

19 And the first proxy for that is: How do they go about
20 choosing and evaluating counsel selections?

21 This group has submitted a detailed declaration that goes
22 far beyond the joint declarations that are submitted in the
23 vast majority of cases where you have a group seeking to be
24 appointed as the lead plaintiff.

25 In that regard, they detail how they interviewed counsel;

1 how it was their idea to join with other investors; how, in
2 fact, a number of the members of the Tesla Investor Group
3 interviewed both firms. And it was their suggestion: Why
4 don't you, the Labaton Sucharow firm and the Keller Lenkner
5 firm, work together? We'd like to be part of a group that
6 represents all investors.

7 And that's the genesis of this group, which stands apart.
8 For the lawyers in this room who practice in this space and for
9 myself, who's been practicing in this space for 15 years, it is
10 the most authentic, organic investor group I've ever seen.

11 Beyond that, of course, the place we start on the analysis
12 is the statutory text, which very clearly says it's a group.
13 And the measure of whether that group is appropriate is a
14 simple, ordinary, straightforward Rule 23 analysis. Is it
15 adequate? Is it typical?

16 And the evidence that we've submitted in that declaration,
17 I believe, supports that strongly. In fact, it's gone so far
18 beyond the type of evidence that a Court should consider in
19 appointing any lead plaintiff, whether it's a group or it's an
20 individual. You want to know that that individual has
21 interviewed counsel. What's their plan to oversee the case?

22 And this, in fact, of course, is going to segue into our
23 opposition to the Tempus/OUF motion. We heard from counsel
24 from Tempus and OUF that Tempus and OUF are going to protect
25 the class. "We're going to make sure."

PROCEEDINGS

1 Who is Tempus and OUF? They have no employees. They have
2 no operations. They have no office. They have two directors
3 who are professional directors of offshore companies. They
4 serve at the pleasure of Opportunity Investment Group. So
5 they're a figment. They're a charade.

6 Why -- and so then we go after Opportunity. We say, well,
7 Opportunity hasn't moved. Opportunity hasn't submitted to the
8 jurisdiction of the Court. Opportunity hasn't indicated
9 they're going to come and testify.

10 No, no. Don't look at Opportunity. Opportunity is not
11 the lead plaintiff here. You should ignore Opportunity. It's
12 Tempus and OUF.

13 But they don't exist.

14 **THE COURT:** All right. I will take this matter under
15 submission. I appreciate it.

16 I do have one question for you. All your investors, are
17 they on Facebook? Are they friends? Are they --

18 **MR. CHRISTOPHER KELLER:** They have spoken twice. They
19 do know each other. It's a very active group.

20 **THE COURT:** Are they on WhatsApp? Do they have a --
21 just curious. Different generation perhaps.

22 **MR. CHRISTOPHER KELLER:** Thank you, Your Honor.

23 **THE COURT:** All right. Thank you.

24 **MR. CHOI:** Your Honor, before we end this, I just want
25 to point out that contrary to my colleague's insinuations,

1 Tempus and OUF, we have submitted not only declarations of
2 their abilities to don the robe of lead plaintiff, but also, we
3 have provided information as to where they are from and what
4 they do.

5 So I take issue with how the insinuation of my client's --
6 I don't think that that's relevant.

7 **THE COURT:** I understand. And I think you've also had
8 a chance in the papers to respond to some of this, and I am
9 aware of that. So --

10 **MR. CHOI:** Thank you.

11 **THE COURT:** -- that's fine.

12 I'm going to take the matter under submission, obviously.

13 **MR. CHOI:** Thank you, Your Honor.

14 **THE COURT:** This is the first step.

15 It seems like nobody opposes consolidation. We're
16 obviously going to move forward.

17 So the next step is to appoint lead plaintiff and lead
18 counsel.

19 We don't have a further status conference date, and I'd
20 like to set one as a control date on the assumption that we'll
21 be able to make -- render this decision fairly quickly, and we
22 can get moving.

23 Maybe we should set a status conference towards the middle
24 of January. Is that all right?

25 **THE CLERK:** January 17th, Your Honor.

1 **THE COURT:** All right. January 17th at 10:30.

2 And once I do appoint lead plaintiff, lead counsel, we'll
3 have protocol issues and a few other things that we'll want to
4 straighten out. But we will take it one step at a time.

5 So, thank you. Appreciate your cooperation.

6 **ALL:** Thank you, Your Honor.

7 (Proceedings adjourned at 3:17 p.m.)

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11 **CERTIFICATE OF REPORTER**

12 I certify that the foregoing is a correct transcript
13 from the record of proceedings in the above-entitled matter.

14
15 DATE: Thursday, November 22, 2018

16
17
18 *Ana M. Dub*

19 _____
20 Ana M. Dub, CSR No. 7445, RMR, CRR, CCRR, CRG, CCG
21 U.S. Court Reporter
22
23
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25